Supreme Court, U.S.
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No. 96-381

In The

# Supreme Court of The United States

October Term, 1996

NEW YORK STATE THRUWAY AUTHORITY,

*Petitioner,*

- v.-

FRANK MANCUSO and ELLEN MANCUSO, Individually and on behalf of their children DEANNA and THERESA MANCUSO; F. MANCUSO BOATYARD, INC., d/b/a ECHO BAY MARINA,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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25 pp

## QUESTIONS PRESENTED

1. Is the Jurisprudence in *Hess v. Port Authority Trans-Hudson Corp.* in conflict with the jurisprudence applied in the Second Circuit?

2. Is there a legal conflict in the decisions of the other circuits which have applied *Hess* and would such conflict, if such exists, merit the granting of Certiorari under the circumstances of the present case?

3. Does the Court have jurisdiction to hear and decide the other facts and arguments presented in the petition if they were not made part of the record below?

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## COUNTER-STATEMENT OF THE CASE

The New York State Thruway Authority's (NYSTA) North Avenue Drain ("NAD"), which was originally constructed to drain only storm water from a small section of Interstate 95 through a large concrete culvert into the west branch of Echo Bay, part of Long Island Sound, is illegally connected to the City of New Rochelle's decrepit sanitary and storm sewage systems, resulting in the seepage, surcharge and discharge into Long Island Sound of raw, untreated sanitary sewage including petroleum, medical waste, human fecal matter and other noxious pollutants in violation, *inter alia,* of Subchapter IV, Chapter 26 of Title 33 of the United States Code, and 33 U.S.C. §§ 407, 441, 1311 and 1321. Respondents (Plaintiffs below), the family owners and operators of a small marina in the City of New Rochelle situated at the outfall of NAD, commenced this citizen lawsuit for injunctive relief against the Petitioner and the City of New Rochelle under the Federal Water Pollution Control Act, *33 U.S.C. 1251, et. seq.*, popularly referred to as the "Clean Water Act". Included in their complaint, pursuant to the District Court's supplemental jurisdiction *28 U.S. C. §1367,* were their claims for personal injury and private property damage. They lost their business and their health and are now penniless because NAD functions, with the knowledge and approval of NYSTA, as the overflow channel by which a decayed urban sanitary system by-passes an over capacitated treatment plant.

Procedural circumstances which render the Petition moot

In its answer to the complaint, NYSTA never interposed the Eleventh Amendment as an affirmative defense, but rather raised it for the first time in a summary judgement motion. The City of New Rochelle in its pleading interposed a cross claim against NYSTA, to which NYSTA never replied, objected or moved. The District Court (Brieant, D.J.), denied the defendants' summary judgement motions, and, as to NYSTA, held that a federal lawsuit could properly be brought for prospective injunctive relief of a continuing violation of federal law, despite any claim of Eleventh Amendment immunity, under the holding of *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). The District Court also found that, in any event, NYSTA was not the State of New York nor an "arm of the state", and was therefore not immune from prosecution in federal Court under the Eleventh Amendment.

NYSTA never appealed from that part of the District Court's finding of jurisdiction under *Ex Parte Young*, nor from the Court's exercise of supplemental jurisdiction, but only appealed so much of the District Court's ruling which found that it was not "an arm of the state" and not immune under the Eleventh Amendment. The Second Circuit (Oakes, Mahoney , Walker, C.J.), considering NYSTA's Appeal under the doctrine of the "collateral order exception", *Cohen v. Beneficial Industrial Loan Corp.* 337 U.S. 541 (1946); *Puerto Rico Aqueduct and Sewer Auth. V. Metcalf & Eddy, Inc.* 506 U.S. 139 (1993); *Komlosi v. New York State Office of Mental Retardation & Developmental Diabilities*, 64 F.3d 810 (2d Cir. 1995), carefully considered the legislative scheme by which NYSTA was engendered, as well as the New York State Constitution, which prohibited debts of NYSTA from becoming debts of the State of New York, and found that: (1) NYSTA, was a public corporation independent of the state both fiscally

and in terms of state oversight and control, (2) NYSTA was not an "arm of the state", and (3) the "dignity of the state" was not implicated in a federal lawsuit which sought injunctive relief and money damages from NYSTA for its admitted poisoning of the Long Island Sound.

In this Petition, the Attorney General again seeks the shield of Eleventh Amendment immunity, twice denied, to protect NYSTA from its admitted pollution, and attempts to create a conflict amongst Circuits, other than the Second Circuit, which have interpreted *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S.___, 130 L.Ed.2d 245, 115 S.Ct. 394 (1994). However, the Attorney General's "Statement of the Case" fails to alert the Court to the hopeless procedural dilemma which requires summary denial of the Petition: (1) no decision by this Court concerning Eleventh Amendment immunity will reverse the District Court's jurisdiction under *Ex Parte Young; (2)* no decision by this Court concerning Eleventh Amendment immunity will affect the District Court's exercise of supplemental jurisdiction under *28 U.S.C. §1367,* to which NYSTA neither imposed timely objection and from which it never appealed, and (3) no decision by this Court concerning Eleventh Amendment immunity will divest the District Court of its jurisdiction of the cross claims interposed without objection by the City of New Rochelle against NYSTA, jurisdiction to which NYSTA has submitted without any reservation in its pleading and from which it likewise never appealed. The full procedural circumstances of this case, which have been omitted from the Petition and which, due to NYSTA's failure to object and/or Appeal, would render any decision by this Court on the Petition moot or ineffectual, constitute misstatements which are hereby corrected pursuant to Rule 15 (2) of the Rules of this honorable Court.

The logical consequence of NYSTA's failure to object to the jurisdiction of the cross-claim, and its failure to Appeal the District Court's sustaining of supplemental jurisdiction under the authority of *Ex Parte Young*, will be that, despite any decision which this Court might wish to render concerning NYSTA's claim of Eleventh Amendment immunity from suit in federal Court, the District Court will continue to have jurisdiction over the Clean Water Act action. At most, a holding which finds that NYSTA is immune in this case would do nothing more than allow for the "splitting off" of the private causes of action, which would allow for the removal of the personal injury and property damage claims to New York's Court of Claims. This would not only require the same case to be tried twice in two different courts, but would also permit the New York Court of Claims to pass simultaneously upon matters of federal environmental law, matters more appropriately addressed in one proceeding in the District Court.

In the District Court, NYSTA also admitted, via its local Rule 3 (g) statements and/or its failure to respond to Requests For Admissions, that: (a) NYSTA owns NAD; (b) City has connections to NAD; (c ) NAD is a "point source" within the meaning of the Clean Water Act; (d) the discharge from NAD contains "pollutants" within the meaning of the Clean Water Act; (e) there is garbage, fecal waste, offal, medical waste being discharged through NAD; (f) that all point source discharges of pollutants are regulated and require a permit under the Clean Water Act; (g) none of the connections to NAD have permits, and (h) the unpermitted discharge of sanitary sewage pollutants from a point source is expressly prohibited under the Clean Water Act. The meek gloss which the Petition makes over the facts which led to this lawsuit does no justice in describing the filth and foul scum discharged each day from NAD, nor does it fairly depict the heinous nature of NYSTA's conduct in allowing such pollution to continue to the point where it ruined the

Plaintiffs' livelihood, rendered them destitute, caused personal and emotional injury and significantly degrades, even now, an ecologically fragile body of water used by millions of People in the northeastern United States.

Ironically, NYSTA is represented by the New York Attorney General's Environmental Protection Bureau, the very state agency designated by Federal Law to pursue and punish polluters. In ignoring the questionable procedural posture of this case, in failing to advise the Court of the full implication of his client's own admissions of guilt, and in attempting to create a non-existent and irrelevant "conflict" amongst the Circuits, the "People's Lawyer" wraps the wolf of a bogus argument in the fleece of a dumb sheep, and insidiously conceals the only real "conflict" in this case: that of an Attorney General who, in defending an independent public corporation and admitted polluter, has refused to take any action to protect the People and stop the spewing of the filth and scum discharged every day from NAD. It is in this factual context, one either ignored or not fully elucidated by the Attorney General in his "Statement of the Case", that this disingenuous and ill reasoned Petition should be judged.

## SUMMARY OF ARGUMENT

Besides the procedural circumstances, described above, which virtually render NYSTA's claim of Eleventh Amendment immunity moot, the petition for a writ of certiorari should also be denied for the following additional reasons:

1. The Eleventh Amendment jurisprudence applied by the Second Circuit to this case is neither "unsettled" nor "confused", and has been clearly established by the Court in

*Hess v. Port Authority Trans-Hudson Corp.* __U.S.__, 115 S.Ct. 394, 130 L.Ed. 2d 245 (1994) and *Lake Country Estates, Inc. v. Lake Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) and *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 50 L.Ed.2d 471, 97 S.Ct. 568 (1974).

2. There is no "conflict" among the Circuits concerning the Eleventh Amendment jurisprudence applied in this case. Any "difference of approach" that NYSTA urges this Court to find between that taken by the Second Circuit in this case, and that taken by the Fourth Circuit in *Thiel v. State Bar of Wisconsin*, __F.3d __, No. 95-3442, 1996 WL 496629 and/or that taken by the Fourth Circuit in *Ristow v. South Carolina Port Authority*, 58 F.3d 1051 (4th Cir.), cert. denied __U.S.__, 116 S.Ct. 514, 133 L.Ed. 2d 423 (1995), is attributable solely to the unique fact patterns in each case, and is not based on any irreconcilable legal conflict in the Eleventh Amendment jurisprudence applied in this case.

3. The Court lacks jurisdiction to consider or decide the arguments and facts relating to "changes in state government structure", and "autonomy of organizing and financing public undertakings" because these matters were not made a part of the record below.

# I

## NEITHER THE JURISPRUDENCE IN *HESS* NOR THE JURISPRUDENCE APPLIED BY THE SECOND CIRCUIT IS IN CONFLICT

A- The Court's ruling in *Hess*, is clear and applies traditional Eleventh Amendment Jurisprudence

The Court's decision in *Hess*, which applied existing Eleventh Amendment jurisprudence to the New York/New Jersey Port Authority and found that it was not an "arm of the state" and not immune, is neither confusing nor unsettling. The Court first examined established jurisprudence with respect to the history and purpose of the Eleventh Amendment and restated the long accepted general principle that "(t)he Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity...It thus accords the States the respect owed them as members of the federation...", *supra.*, 513 U.S.__, 130 L.Ed.245, 255, 115 S.Ct.__. After reviewing the jurisprudence relating to Compact Clause entities, the Court reviewed the indicators for applying Eleventh Amendment immunity to a bistate entity which were established in *Lake Country*, and found that, where the indicators of immunity point in different directions, the Eleventh Amendment's twin reasons for being (i.e. state sovereignty and state dignity) are to remain the prime guide. The Court held that it was not at all disrespectful to call upon Compact Clause agencies to answer complaints in federal Court. Finding no threat to the states' dignity in a federal lawsuit, the Court, continued its inquiry and asked "...as *Lake Country* instructed, whether there is here 'good reason to believe' the States and Congress designed the Port Authority to enjoy Eleventh Amendment Immunity..."

In applying the "good reason to believe" standard the Court considered the "arm of the state" doctrine set forth in *Mt. Healthy* and examined the fundamental goal of the Eleventh Amendment, which is to shield the States' treasuries. The Court concluded, as New York State conceded in its *amicus curiae* brief, that the "vast majority of Circuits...have concluded that the state treasury factor is the most important factor to be considered...and, in practice, have generally accorded this factor dispositive weight..." *Hess, supra.* 130 L.Ed. 2d, 261. *Hess* therefore presented nothing new or unsettled, but rather considered the decisions of various Circuits and found that the "state treasury factor" was the most decisive element in determining whether or not an independent public corporation might still be considered as "an arm of the state" for the purposes of conferring Eleventh Amendment immunity.

The only thing new and unsettling is the Attorney General's mendacious attempt to back away from the concession made by his office in the *amicus curiae* brief in *Hess*, which confirmed the Attorney General's concurrence with the "state treasury" proposition. Besides this concession, the Attorney General has, in numerous state Court proceedings involving NYSTA, consistently argued that NYSTA is **not** the State of New York, but rather an independent corporation. The Environmental Protection Bureau does nothing to reconcile this hypocrisy in legal argument.

B- <u>The Second Circuit's decision is also based on traditional Eleventh Amendment jurisprudence and is not in conflict with *Hess*</u>

The Second Circuit's decision in this case carefully reviewed the statutory scheme by which NYSTA was created, and NYSTA's relationship to the State. The Court applied non-controversial Eleventh Amendment jurisprudence in an

appropriate manner and is not in conflict with *Hess*. Although *Hess* involved a bi-state compact entity, the Court observed that it nevertheless was the proper starting place for an Eleventh Amendment inquiry, citing: *Gray v. Laws*, 51 F.3d 426, 431 (4th Cir. 1995). The Court first examined the six factors identified in *Lake Country Estates, Inc. v. Lake Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), as derived from *Feeney v. Port Authority Trans-Hudson Corp.* 873 F.2d 628, 630-631 (2d Cir. 1989), *aff'd on other grounds*, 495 U.S. 391 (1979) and found them to be equally balanced in favor of and against a finding of immunity. The sixth factor considered, i.e. whether a judgement against NYSTA would place the state's treasury at risk, was found to weigh against immunity because of New York State's constitutional prohibition and statutes which specifically provided that NYSTA's debts were not the State's.

But the Second Circuit's inquiry did not end there. The Court then asked, as *Hess* requires, whether or not a judgement against NYSTA "would have the practical effect of requiring payments from the State", citing: *Ristow v. South Carolina Ports Auth.*, 58 F.3d 1051, 1053 (4th Cir. 1995). The Court held that:

> "(t)he Thruway Authority has provided no evidence that it would have any difficulty in satisfying a judgement in this case, or in any other. Instead, the Thruway Authority simply speculates that if the plaintiffs were to receive all the damages they claim ($105 million), its financial stability would be threatened. But this differs little from the Port Authority's unsubstantiated claim in *Hess* that a judgement against it would adversely impact the treasuries of New York and New Jersey...***The reality is***

> ***that the Thruway Authority is "structured [like] the Port Authority is, to be self sustaining"***...Thus, we have no difficulty in concluding that any judgment against the Thruway Authority in this case poses no threat to the finances of New York."

With the six *Feeney* factors in equipose, the Court then turned, as *Hess* requires, to the two long established purposes underlying the Eleventh Amendment-protection against state liability and respect for state sovereignty. Finding that the state treasury was "not even minimally at risk" the Court found that the sole question remaining was, as required by *Hess*, whether suit in federal Court would be an affront to the dignity of New York State. Contrary to NYSTA's assertion (Petition, p.9) that the Second Circuit "devalued" the Eleventh Amendment's concern with the "dignity of the state", the Second Circuit properly considered the issue and found that: (1) NYSTA had an existence quite independent from New York State and (2) New York State exercised, at most, minimal control over NYSTA, thus justifying the legal conclusion that the Eleventh Amendment's concerns of state sovereignty and dignity were not implicated. The Court then held that:

> " the state sovereignty concern weighs neither in favor of nor against Eleventh Amendment immunity...*Although the Thruway Authority may be identified closely with the state, New York State has given the Thruway Authority an existence quite independent from the state and exercises minimal control over the Thruway Authority. We are unable to conclude that subjecting the Thruway Authority to suit in federal Court would be an affront to the dignity of New York.* Because the concern for state

> liability weighs against the finding of immunity and *because the concerns of state sovereignty and dignity are not fully implicated,* we hold that the Thruway Authority is not entitled to Eleventh Amendment immunity."

Therefore, any claim that either the ruling in *Hess* or the decision in this case sows "conflict" by not properly addressing or "devaluing" established jurisprudence concerning the states "sovereign dignity" is belied by a specific negative finding.

The dignity of any state is derived from the dignity of the People of that state. It is the People who, in constituting the state, in consenting to be taxed and to be governed by representatives which they elect, confer the state with dignity and sovereignty. NYSTA is not the State of New York. It is a completely separate and independent public corporation whose officers are not elected by the People. Elected officials exercise the most minimal control over it. It has no authority to tax the People. Its treasury is independent of the State's and outside of the People's control. State constitutional provisions prevent the raising of the debt ceiling except by public referendum (N.Y.S. Constitution, Article VII, §11), and absolutely prohibit the debts of NYSTA (except the initial funding, which has long since been retired) from becoming the debts of the State (N.Y.S. Constitution, Art. 10, §5 & 6). NYSTA therefore derives no dignity or sovereignty from the People of the State of New York. No dignity of the State can be implicated where there is no legal or factual basis to hold that NYSTA is an "arm of the state". This is especially true where, under identical circumstances, the New York-New Jersey Port Authority, admittedly a bi-state compact agency, yet created under a statutory scheme almost identical to NYSTA, has already been found by this Court in *Hess* not to be an "arm of the state" and unable to partake in Eleventh Amendment immunity.

The Attorney General's nice recitation of past legislative enactments concerning NYSTA's independent financing of state infrastructure projects demonstrates nothing more than a cute pattern of legislative convenience. While NYSTA may be utilized as a discretionary vehicle to raise funds at the whimsy of the State's Legislature, its funding and liability have never been, and is prohibited from becoming, the legal responsibility of the State of New York. In choosing to create NYSTA as a separate public corporation the Legislature cut NYSTA free from the umbilical of the State and Eleventh Amendment immunity, which could have easily been retained by constituting it as a department of state government.

The arguments advanced in this Petition are diametrically opposed to the position which Attorney General has taken in all other recent lawsuits against NYSTA, in which the Attorney General has consistently argued that NYSTA **is** an independent entity and **not** an "arm of the state", [ See: *Schulz v. New York*, 84 N.Y. 2d 231, 616 N.Y.S. 2d 343, 639 N.E. 2d 1140 (1994); *Mathewson v. New York State Thruway Authority*, 22 Misc. 2d 410, 196 N.Y.S. 2d 215, *reversed on other grounds*, 11 A.D. 2d 782, 204 N.Y.S. 2d 904, *aff'd.* 9 N.Y. 2d 788, 215 N.Y.S. 2d 86, 174 NE 2d 754 (1961); *Bonaventure v. New York State Thruway Authority*, 108 A.D. 2d 1002, 485 N.Y.S. 2d 391 (3rd Dept. 1985); *MacFarland Breakell Bldg. Corp. v. New York State Thruway Authority*, 123 Misc. 2d 307, 472 N.Y.S. 2d 1004, *aff'd.* 104 A.D. 2d 139, 484 N.Y.S. 2d 166 (3rd Dept. 1984)]. Now that a completely opposite tack is expedient, the Attorney General takes a position completely controverted by prior admissions and contentions without so much as an intellectual blush. Such hypocrisy in legal argument, when considered in the light of an egregious conflict of interest, should lead this Court to deny the petition.

## II

## NO LEGAL "CONFLICT" IN THE DECISIONS OF THE OTHER CIRCUITS WHICH HAVE APPLIED *HESS* EXISTS, NOR WOULD ANY SUCH "CONFLICT" MERIT THE GRANTING OF CERTIORARI UNDER THE CIRCUMSTANCES PRESENTED IN THIS CASE

A- The Eleventh Amendment claim of immunity is moot in the procedural context of this case

The "conflict" between the circuits that the Attorney General would have his Court find do not merit the granting of certiorari here, because, assuming, *arguendo*, that NYSTA is immune, jurisdiction in the federal courts is still proper under the holding of *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) and the unobjected to supplemental jurisdiction of the District Court, *28 U.S.C. § 1367*. Therefore, despite any claim of immunity, the federal Clean Water Act lawsuit will proceed on the basis of injunctive relief. Therefore, the District Court, under *Federal Rules of Civil Procedure, §§ 18, 19, 20 and 42*, and pursuant to the authority of *United Mine Workers of America v. Gibbs*, 86 S.Ct. 1130, 383 U.S. 715, 16 L.Ed. 2d 218 (1966), will have in any event properly exercised its supplemental jurisdiction over the private property damage and personal injury claims. Moreover, since NYSTA, in its pleadings, never responded to the cross-claim of the City of New Rochelle nor objected to the District Court's jurisdiction thereof, its Eleventh Amendment immunity claim is moot because such cross claim must now be decided in the context of the pending federal case. While the procedural circumstances alone merit the denial of this Petition, the Court will also find no real "conflict" in the jurisprudence applied by the various Circuits that relates to the facts in this case.

B- Any "conflict" among the Circuits concerning the Eleventh Amendment jurisprudence is fact specific and distinguishable

The alleged "conflict" between the Second Circuit's ruling in this case and *Hess* is at least partially belied by this Court's recent denial of certiorari in the Third Circuit decision in *Christy v. Pennsylvania Turnpike Com'n.*, 54 F.3d 1140 (3d Cir.) cert. denied, __U.S.__, 116 S.Ct. 340, 133 L.Ed.2d 238 (1995). The factors considered by the Third Circuit are the same as those established in *Lake Country*. The Third Circuit found that "prevention of federal Court judgements ... be paid out of the state's treasury" and "the vulnerability of the State's purse" to be the most salient factor in Eleventh Amendment determinations..." *supra., 1145,* a finding in complete accord with *Hess, Lake Country* and the Second Circuit's opinion in this case. The Court having denied certiorari in *Christy,* under legal circumstances almost identical to this case and those in *Hess,* is not now presented with any cogent new basis to grant certiorari here.

Reliance on a "conflict" asserted to exist as a result of the Seventh Circuit's decision in *Thiel v. State Bar of Wisconsin*, __F.3d __, (3d Cir., September 3, 1996) No. 95-3442, 1996 WL 496629 or the Fourth Circuit's decision in *Ristow v. South Carolina Port Authority*, 58 F.3d 1051 (4th Cir.), cert. denied __U.S.__, 116 S.Ct. 514, 133 L.Ed. 2d 423 (1995) is also illusory since, the decisions in each case were based on unique facts, not conflicting principles of constitutional law. These unique facts distinguish the reasoning and approaches applied by these two Circuits from the reasoning applied by the Second Circuit in this case.

In *Ristow* the Fourth Circuit found that the South Carolina legislature heavily supported its Ports Authority

through direct annual appropriations for the first seventeen years of its existence. South Carolina also issued general obligation bonds totaling $132 million and deposited the proceeds from those bond offerings in the Ports Authority's bank accounts. South Carolina also had the power to withdraw surplus revenues from the Ports Authority's account and deposit them in the general treasury. In addition, in connection with the establishment of a new BMW manufacturing plant, South Carolina transferred over $40 million from its treasury to the Ports Authority so that it could acquire the land on which to build the facility. The Court's holding in *Ristow* was based upon a specific factual finding of financial dependence: "All of this convinces us that, unlike Port Authority Trans-Hudson, the entity considered in *Hess*, the (South Carolina) Ports Authority is not self sufficient" (*Ristow*, supra., at 1053). Moreover, nothing in the Fourth Circuit's decision in *Ristow* overruled its holding in *Gray v. Laws*, 51 F.3d 426 (4th Cir. 1995) which ruled that the same factors identified in *Hess* as being relevant in a multistate agency context, *i.e.*, treasury and sovereignty concerns, extent of state control, state characterization of the entity and entity functions, are applicable to single state entities. Unlike the Ports Authority in *Ristow*, NYSTA is financially independent of the State of New York. Given the Fourth Circuit's holding in *Gray*, and the distinct factual finding of financial dependence made in *Ristow*, the "conflict" in the Fourth Circuit is bogus and no genuine basis to grant certiorari here.

Similarly, the "conflict" which NYSTA would have this Court find in the Seventh Circuit's decision in *Thiel v. State Bar of Wisconsin*, __F.3d __, No. 95-3442, 1996 WL 496629 (7th Cir. September 3, 1996) is also factually distinguishable. In *Thiel*, the Court considered whether or not the Wisconsin State Bar, which governed the conduct of lawyers and collected dues for purposes relating to their judicial supervision, and which was

administered and controlled by the Wisconsin Supreme Court, was immune under the Eleventh Amendment in a suit which was challenging Bar rules which had been approved by the Court. The Court, citing its earlier decision in *Crosetto v. State Bar of Wisconsin,* 12 F.3d 1396 (7th Cir. 1993) considered the question of "whether the State Bar ...is vested with sufficient state characteristics to qualify for sovereign immunity". The Seventh Circuit found that, because the Wisconsin Supreme Court exercised direct control over the State Bar, and because Wisconsin lawyers were officers of the Court subject to the supervision of the Wisconsin Supreme Court, the State Bar was an agent of the Wisconsin Supreme Court, an "arm of the state", and any "impact on the state treasury" was not a primary concern.

Reliance by the Attorney General on *Hadley v. North Arkansas Community Technical College,* 76 F.3d 1437, (8th Cir. 1996) petition for cert. filed 65 U.S.L.W. 3001 (June 24, 1996) (No. 95-2060), is also misplaced. There, the Eighth Circuit, confronted with the question of the immunity of local community college, with local political and financial involvement, held that "the resulting Eleventh amendment immunity questions tend to be difficult and very fact specific" (emphasis added). The Eighth Circuit found nothing inconsistent with the Court's reasoning in *Hess* and the test which it applied, *viz.* "(to) examine the particular entity in question and its power and characteristics as created by state law, to determine whether the suit in reality is a suit against the state", *supra. 1438.* Examining the Arkansas law which engendered and sustained the state's community college system, The Eighth Circuit found direct involvement by the voters of the state, direct state supervision, direct state funding and a statute which included this state institution in the state's obligation of financial support. Thus, the Eighth Circuit concluded that the community college in question was an "arm of the state" under

the traditional analysis required by *Mt. Healthy*. This analysis is identical to that applied by the Second Circuit in this case.

Unlike the Wisconsin State Bar in *Thiel*, NYSTA is clearly not an agent or arm of the state. Unlike the Ports Authority in *Ristow*, NYSTA is not financially dependent on the State's treasury. Unlike the community technical college in *Hadley*, NYSTA is neither directly supervised or funded by the State. Similar to the Port Authority of New York and New Jersey in *Hess*, NYSTA is neither controlled nor funded by the State, and its debts are not the debts of the State. The Court's rulings in *Hess*, *Lake Country* and *Mt. Healthy* inexorably led to the Second Circuit's finding that NYSTA was not an "arm of the state" but rather had an existence quite separate and apart from the state. Yet, even after the Second Circuit made this finding, it continued with the inquiry to determine whether or not the two purposes underlying the Eleventh Amendment, i.e. protection of the state's treasury and sovereignty, were implicated. The Court determined that: (t)he Thruway Authority ...is not a traditional state agency, but a public entity that is generally self-funded and, except for the appointment of its members to nine-year terms, it is not under significant state control." Because the Second Circuit specifically found that "concerns of state sovereignty and dignity are not fully implicated" , its decision was rationally based on both examination of the "state treasury factor" and examination of the "state dignity" factor. The decision is therefore not in conflict with *Hess* nor with the decisions of the Third, Fourth or Seventh Circuits, nor with the Eighth Circuit's decision in *Hadley*.

## III

## THE COURT LACKS JURISDICTION TO HEAR AND DECIDE THE OTHER FACTS AND ARGUMENTS PRESENTED IN THE PETITION BECAUSE THEY WERE NOT MADE A PART OF THE RECORD BELOW

Besides the procedural circumstances described in the Respondent's Counter-Statement of the Case, which render this Petition and the Court's jurisdiction most dubious, and to the extent that NYSTA argues that "accelerating changes in state governmental structure" or considerations of "autonomy of in organizing and financing" mandate granting of this writ, the Court also lacks jurisdiction to consider these issues because no record of these matters was made below. To the extent that NYSTA argues that "the State relies on NYSTA as an integral component in the planning, financing and implementing of state-wide transportation facilities" such argument is not based on any matter in the record and, in any event, is specifically contradicted by the lower courts' finding that the State's dignity was not affronted by subjecting NYSTA, an independent public corporation not controlled by the State, not bound to the State's treasury, to a lawsuit in federal Court. The District Court's factual determination that NYSTA was not an "arm of the state", and the Second Circuit's affirmance, were based on a record devoid of the arguments and facts now advanced in the Petition. Factors not part of the record below are not properly before this Court and should not be considered in deciding this Petition.

## CONCLUSION

The dignity and sovereignty of each state derives from the dignity of the People of that state. NYSTA is constitutionally and statutorily independent of that dignity and sovereignty. NYSTA's admitted pollution in this case, now unchecked as a result of an irreconcilable conflict of interest, unconscionable inaction and illogical arguments, offends the People's dignity beyond any shield of immunity and creates an injustice so great that must surely make the United States Constitution weep. NYSTA should be permitted to stand trial in federal Court before the People and answer for its admitted injustice to the People. The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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